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Golden Plus Holdings Bhd v Eng Hup Tat & Ors

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-444–09 OF 2020
AHMAD FAIRUZ J
16 APRIL 2021

C *Companies and Corporations — Shares — Allotment — Former directors purported to allot shares in company to outsider who in turn transferred them to third party — Whether the share allotment was null and void for breaching court order recognising new directors of company following resolutions to that effect passed at company's extraordinary general meeting ('EGM') — Whether in accordance* D *with the court order the new directors had not validated any action taken by the former directors — Whether purported transfer by the outsider of the 'alloted shares' to a third party was also invalid as outsider himself had no good title to the shares — Whether third party could not claim to be bona fide purchaser of the shares because he had not given any valuable consideration for their acquisition* E *— Whether both the outsider and the third party were not shareholders of the company and had no locus to call for EGM to remove the company's new directors*

On 28 August 2020, the High Court granted an order naming three persons ('the new directors') as the validly-appointed directors of the plaintiff pursuant F to resolutions to that effect passed at its extraordinary general meeting ('EGM') held on 6 March 2020. In the order, the court declared that all acts of the plaintiff's former directors whether taken before or after the passing of the resolutions at the EGM were null, void and invalid unless they were validated by the new directors. Just two days before the said order was pronounced, the G former directors of the plaintiff allotted 46,196,995 shares in the company to the first defendant ('Eng') who, in turn, transferred the shares to the second defendant ('Duwee'). The shares were allotted to Eng purportedly to satisfy a settlement agreement ('SA') between the plaintiff, Eng and another company ('CIDL') in which it was acknowledged that the plaintiff owed CIDL a H RM9.2m debt which Eng had agreed to settle in return for being allotted shares in the plaintiff. With the share allotment and transfer, the defendants became registered as shareholders of the plaintiff and they subsequently issued notice to convene an EGM to remove the new directors. The plaintiff filed the instant originating summons ('OS') to declare the allotment of the shares to Eng, the I transfer of the shares by him to Duwee and the notice to convene the EGM as null and void. In response, Eng and the third defendant applied to strike out the OS on the ground that the plaintiff's failure to cite CIDL and the former directors as parties to the OS was fatal. The plaintiff argued that since the High Court order recognised the former directors as no longer having power to act

for the plaintiff, the allotment of the shares to Eng and his transfer of the shares to Duwee were invalid; that Eng and Duwee therefore could not be considered as shareholders of the plaintiff and hence had no locus to call for the EGM. The defendants, on the other hand, argued that the court order dated 28 August 2020 only referred to acts done by the former directors before the 6 March 2020 EGM and that the order did not invalidate the SA or the allotment of shares to Eng since both those matters occurred in August 2020. Duwee further contended that he was a bona fide purchaser for value of the shares from Eng.

Held, allowing the plaintiff's OS and dismissing the defendants' striking-out applications:

(1) Following the EGM on 6 March 2020, there was a new set of directors on the board of the plaintiff as reflected in para 3 of the High Court order dated 28 August 2020. The former directors no longer had authority to act for the plaintiff. Paragraph 3 of the court order expressly stated that the acts of the former directors would require validation by the new directors. It would be absurd to make the interpretation that the validation by the new directors was not required simply because they were not acts of the directors prior to 6 March 2020. Such an argument, if accepted, endorsed acts done by the former directors as valid when in fact they had no authority to act for the plaintiff. This was contrary to the intention behind the said order which clearly sought to remove the former directors from the board. It was clear that the court order dated 28 August 2020 was meant to endorse the removal of the former directors of the plaintiff from the board and consequentially strip them of any authority. No other interpretation could be had from a reading of the order (see paras 29, 31–32 & 35).

(2) To read the court order in the manner interpreted by the defendants was to render it otiose. The order had to be read purposively. From a reading of the pleadings connected with that order, it was meant to give effect to the removal of the former directors from the board and their powers had to inextricably cease as a result of their removal. The interpretation that the acts of the former directors were not caught by the order because it was an act done after 6 March 2020 could not hold water. After that date, the former directors had no authority to act for the plaintiff by virtue of their removal (see paras 38–39).

(3) The allotment of the shares to Eng was invalidated by para 3 of the court order as it was an act of the former directors carried out on 26 August 2020. Paragraph 3 was the annulment order which negatived any right or title that might have existed even if registration had taken place. As no validation was obtained from the new directors, the allotment of the

shares and their subsequent transfer to Duwee breached para 3 of the order and Eng had no title to the shares which he could transfer to Duwee (see paras 44–46).

(4) From the contents of his own affidavit, Duwee never paid for the shares that he purportedly bought from Eng. He had merely promised to pay but never did. He was therefore not a bona fide purchaser for valuable consideration. An unfulfilled promise to pay remained executory and was not valuable consideration for the purpose of the bona fide principle. Duwee was not a bona fide purchaser and the SA was simply a device to transfer the shares to him. The transfer of the shares to Duwee was null and void. A genuine or bona fide sale and purchase transaction could not conceivably be one where Duwee could acquire the shares and yet postpone his obligation to pay for them on his own terms (see paras 52, 55–57, 60–61 & 68–69).

(5) The 'unholy haste' with which the allotment and transfer of the shares were carried out, sidestepping several key contractual terms, showed that the transactions were not in any manner conducted at arm's length but was a well co-ordinated scheme that was put in place to ensure that the allotted shares were transferred to a third party with the intent of diluting the plaintiff's shares (see paras 66 & 68).

(6) The argument that the plaintiff's OS was fatally defective for not naming CIDL and the former directors as parties had no merit as the plaintiff did not seek any relief against CIDL and the former directors or assail the conduct of the former directors. The issue before the court was purely an interpretation of para 3 of the court order dated 28 August 2020 and whether on the face of it para 3 had been breached. Accordingly, it was not a proper case for the court to entertain the defendants' striking-out applications and the same had to be dismissed (see paras 10–24).

[Bahasa Malaysia summary

Pada 28 Ogos 2020, Mahkamah Tinggi telah membenarkan perintah yang menamakan tiga orang ('pengarah-pengarah baru') sebagai pengarah-pengarah baru yang dilantik secara sah oleh plaintif menurut resolusi yang diluluskan pada mesyuarat agung luar biasa ('EGM') yang diadakan pada 6 Mac 2020. Di dalam perintah tersebut, mahkamah telah mengisytiharkan bahawa semua tindakan bekas pengarah plaintif sebelum atau selepas resolusi yang dikeluarkan di dalam EGM tersebut adalah batal, dan tidak sah melainkan ianya disahkan oleh pengarah-pengarah baru. Dua hari sebelum perintah tersebut diberikan, bekas pengarah plaintif telah memberikan 46,196,995 saham di dalam syarikat tersebut kepada defendan pertama ('Eng') yang seterusnya memindahkan saham tersebut kepada defendan kedua ('Duwee'). Saham-saham tersebut diberikan kepada Eng kononnya untuk memenuhi perjanjian penyelesaian ('SA') antara plaintif, Eng dan syarikat lain ('CIDL') di

mana plaintif berhutang dengan CIDL sebanyak RM9.2 juta dan Eng telah bersetuju untuk menyelesaikannya sebagai balasan untuk saham plaintif diberikan. Dengan pemindahan saham tersebut, defendan-defendan telah didaftarkan sebagai pemegang saham plaintif dan mereka kemudiannya mengeluarkan notis untuk mengadakan EGM untuk memecat pengarah baru. Plaintif kemudiannya telah memfailkan saman pemula in ('SP') untuk mengisytiharkan pemindahan saham kepada Eng dan Duwee dan notis EGM sebagai batal dan tidak sah. Sebagai tindak balas, Eng dan defendan ketiga telah memohon untuk membatalkan SP atas alasan bahawa kegagalan plaintif untuk menamakan CIDL dan bekas pengarah-pengarah sebagai pihak di dalam SP adalah ralat. Plaintif berhujah bahawa memandangkan perintah Mahkamah Tinggi mengiktiraf bekas pengarah-pengarah sebagai tidak lagi mempunyai hak untuk bertindak bagi plaintif, pemindahan saham kepada Eng dan Duwee adalah tidak sah; oleh itu, Eng dan Duwee tidak boleh dianggap sebagai pemegang saham plaintif dan oleh itu tidak mempunyai locus standi untuk memanggil EGM. Defendan, sebaliknya, berhujah bahawa perintah Mahkamah bertarikh 28 Ogos 2020 hanya merujuk kepada tindakan yang dilakukan oleh bekas pengarah-pengarah sebelum EGM 6 Mac 2020 dan perintah tersebut tidak membatalkan SA atau peruntukan saham kepada Eng kerana kedua-dua perkara itu berlaku pada Ogos 2020. Duwee selanjutnya berhujah bahawa dia adalah pembeli saham bona fide dari Eng.

Diputuskan, membenarkan SP plaintif dan menolak permohonan pembatalan SP oleh defendan-defendan:

(1) Selepas EGM pada 6 Mac 2020, pengarah-pengarah baru dalam lembaga plaintif telah dilantik seperti yang dinyatakan di dalam perenggan 3 perintah Mahkamah Tinggi bertarikh 28 Ogos 2020. Bekas pengarah-pengarah tersebut tidak lagi mempunyai kuasa untuk bertindak untuk plaintif. Perenggan 3 perintah mahkamah dengan jelas menyatakan bahawa tindakan bekas pengarah memerlukan pengesahan oleh pengarah-pengarah baru. Adalah tidak masuk akal untuk membuat tafsiran bahawa pengesahan oleh pengarah-pengarah baru tidak diperlukan kerana mereka bukan pengarah-pengarah sebelum 6 Mac 2020. Hujah sedemikian, jika diterima, akan menyebabkan tindakan yang disahkan oleh bekas pengarah-pengarah sebagai sah apabila sebenarnya mereka tidak mempunyai kuasa untuk bertindak bagi plaintif. Ini bertentangan dengan tujuan perintah tersebut yang jelas untuk mengeluarkan bekas pengarah-pengarah dari lembaga pengarah tersebut. Adalah jelas bahawa perintah Mahkamah bertarikh 28 Ogos 2020 tersebut bertujuan untuk penyingkiran bekas pengarah-pengarah plaintif daripada lembaga tersebut dan seterusnya melucutkan mereka daripada sebarang kuasa. Tiada tafsiran lain untuk perintah tersebut (lihat perenggan 29, 31–32 & 35).

(2) Penfasiran perintah mahkamah seperti yang dihujahkan oleh

defendan-defendan adalah tidak munasabah. Perintah tersebut perlu dibaca secara 'purposive'. Dari penelitian pliding yang berkaitan dengan perintah tersebut, ianya merujuk kepada penyingkiran bekas pengarah-pengarah dari lembaga tersebut dan kuasa mereka terpaksa dihentikan akibat penyingkiran tersebut. Tafsiran bahawa tindakan bekas pengarah-pengarah tidak tertakluk kepada perintah tersebut kerana ianya adalah perbuatan yang dilakukan selepas 6 Mac 2020 tidak dapat dipertahankan. Selepas tarikh tersebut, bekas pengarah-pengarah tersebut tidak mempunyai kuasa untuk bertindak bagi plaintif disebabkan penyingkiran mereka (lihat perenggan 38–39).

(3) Pemindahan saham kepada Eng telah dibatalkan oleh perenggan 3 perintah mahkamah tersebut kerana ianya adalah tindakan bekas pengarah-pengarah pada 26 Ogos 2020. Perenggan 3 adalah perintah pembatalan yang membatalkan hak atau tajuk yang mungkin wujud walaupun pendaftaran telah berlaku. Oleh kerana tiada pengesahan diperolehi daripada pengarah-pengarah baru, pemindahan saham dan pemindahan berikutnya kepada Duwee melanggar perenggan 3 perintah tersebut dan Eng tidak mempunyai hak milik kepada saham untuk dipindahkan kepada Duwee (lihat perenggan 44–46).

(4) Dari kandungan afidavitnya, Duwee tidak pernah membayar saham yang dibelinya daripada Eng. Dia hanya berjanji untuk membayar tetapi tidak pernah melakukannya. Oleh itu, dia bukannya pembeli bona fide. Bayaran yang tidak dibuat adalah satu executory dan bukan satu balasan yang bernilai yang membolehkan prinsip bona fide digunapakai. Duwee bukan pembeli bona fide dan SA tersebut hanyalah alat untuk memindahkan saham kepadanya. Pemindahan saham kepada Duwee adalah terbatal dan tidak sah. In adalah bukan jual beli bona fide yang mana Duwee boleh memperoleh saham tersebut dan dia menangguhkan kewajipannya untuk membayarnya dengan syaratnya sendiri (lihat perenggan 52, 55–57, 60–61 & 68–69).

(5) 'Gegasan tidak baik' yang mana peruntukan dan pemindahan saham telah dijalankan, mengenepikan beberapa terma kontrak utama, menunjukkan bahawa transaksi tersebut tidak berada di dalam prosedur yang betul tetapi juga merupakan satu cara untuk saham tersebut dipindahkan kepada pihak ketiga dengan niat untuk mencairkan saham plaintif (lihat perenggan 66 & 68).

(6) Hujah bahawa SP plaintif telah defektif kerana tidak menamakan CIDL dan bekas pengarah-pengarah sebagai pihak-pihak tidak mempunyai merit kerana plaintif tidak meminta relif terhadap CIDL dan bekas pengarah-pengarah atau kelakuan bekas pengarah-pengarah. Isu di hadapan mahkamah ini adalah berkenaan tafsiran perenggan 3 perintah mahkamah bertarikh 28 Ogos 2020 tersebut dan sama ada di perenggan 3 tersebut telah dilanggar. Oleh itu, ianya bukan kes yang

sesuai untuk mahkamah ini untuk membenarkan permohonan pembatalan SP oleh menarik diri defendan (lihat perenggan 10–24).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347; [1985] CLJ Rep 45; [1985] 1 CLJ 235, FC (refd)

Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd [2006] 4 MLJ 271; [2006] 2 CLJ 1021, CA (refd)

Finishing Touch 163 (Pty) Ltd BHP Billiton Energy Coal South Africa Ltd and others [2012] ZASCA 49, SC (refd)

Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal [2006] MLJU 649; [2007] 3 CLJ 413, CA (refd)

Great Investments Ltd v Warner (2016) 335 ALR 542, FC (folld)

International Bank Malaysia Bhd (formerly known as Hock Hua Bank (Sabah) Bhd) v Lovintih bte Balantai @ Betty [2007] 7 MLJ 97; [2007] 6 CLJ 279, CA (refd)

Kenneth Teh Ah Kiam & Anor (receivers and managers of Global Pacific Textile Industries Sdn Bhd, in receivership) v Ketua Pengarah Jabatan Kastam & Eksais & Ors [1998] 1 MLJ 289, FC (refd)

Kwan Ngen Wah & Ors v Hiew Kon Fah & Ors and other appeals [2019] MLJU 226; [2019] 6 CLJ 722, CA (refd)

Malayan Banking Bhd v Premier Expand Sdn Bhd & Ors (the owners of and/or any other persons interested in the ship or vessels the 'Zuhairi' and 'Nasuha') [2013] 8 MLJ 32, HC (refd)

Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520; [2013] 8 CLJ 329, CA (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353, FC (refd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (refd)

Pelangi Prestasi Sdn Bhd v Sabah Forest Industries Sdn Bhd & Ors [2020] MLJU 690, HC (refd)

Pentadbir Tanah Klang, Selangor Darul Ehsan v Mohd Ghazali bin Ahmad [2017] MLJU 154, CA (refd)

Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, intervener) [1996] 2 MLJ 369, FC (refd)

Public Information Officer I Joint Secretary to Chief Commissioner of Land Administration. Hyderabad and Another v AP Information Commissioner (Under Right to Information Act 2005) Rep By Its Chief Information Commissioner Hyderabad And Others 2009 (1) Andhra Law Times Reports 700 (refd)

See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2012] 1 LNS 817, CA (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)

Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188, FC (refd)
Tan Wei Lian & Ors v Mansor bin Masikon & Ors [2019] MLJU 1227, HC (refd)
Tan Wei Mia & Anor v Tan Kom Kok & Ors [2010] MLJU 470, HC (refd)
Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors [2017] MLJU 1078, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 75
Rules of Court 2012 O 15 r 6, 6(1), O 18 r 19
Sale of Goods Act 1957 s 27

Mohanadass Kanagasabai (Thomas Shaun Mathews and Tan Eng Jun with him) (Mohanadass Partnership) for the plaintiff.
Elizabeth Lau (Elizabeth Lau) for the first defendant.
Yudistra Darma Dorai (Christopher Anand Rajamanickam with him) (Raj, Ong & Yudistra) for the second defendant.
Owee Chia Ming (Shermaljit Singh with him) (Owee & Co) for the third defendant.

Ahmad Fairuz J:

INTRODUCTION

[1] Vide encl 1, the plaintiff essentially sought for the following reliefs:

(a) a declaration that the allotment of 46,196,995 shares of the plaintiff ('the shares') to the first defendant is null, void and invalid;

(b) a declaration that the transfer of the shares from the first defendant to the second defendant is null, void and invalid; and

(c) a declaration that the notice to convene an extraordinary general meeting of the plaintiff issued by the second and the third defendants dated 8 September 2020 ('notice of EGM') is null, void and invalid.

[2] The first and the third defendants subsequently filed encls 24 and 27 to strike out the originating summons.

[3] After hearing parties, this court dismissed the striking out applications and allowed encl 1 with costs. These are the full reasons of this court's decision.

BACKGROUND FACTS

[4] The background facts have been set out in the submissions. This court adopts the salient facts as set out herein below:

(a) as a result of the disputes arising from the plaintiff's adjourned extraordinary general meeting convened on 6 March 2020 ('adjourned EGM'), the conveners of the said meeting commenced Originating Summons No WA-24NCC-131–03 of 2020 ('OS 131') while the opposing faction commenced Originating Summons No WA-24NCC-153–04 of 2020 ('OS 153');

(b) on 28 August 2020, OS 153 was dismissed and in respect of OS 131, the High Court, inter alia, made the following order:

> (3) all acts of the Directors of directors and/or directors of the defendant as comprised prior to the passing of the resolutions on 6.3.2020, and taken subsequent to the passing of the resolution on 6.3.2020, unless validated by Chiew Keong On, Yapp Kiam Yen and Wong Koon Wai, as the validly appointed directors pursuant to the Adjourned Extraordinary General Meeting of Golden Plus Holdings Berhad on 6.3.2020, are null, void and invalid;
>
> (4) Chiew Keong On, Yapp Kiam Yen and Wong Koon Wai are the directors of the defendant;
>
> ('the order').

(c) therefore, by the virtue of the order, the former directors of the plaintiff, namely Tan Say Han, Mohd Salleh bin Lamsin, Adey bin Liun, Wan Li Jun, Yang Jin, Wang Zhi Yu, Tan Yen Siang and Teh Wei Kian ('former directors') were properly removed and replaced by the new directors ('new directors');

(d) on 26 August 2020, two days before the order was pronounced, allotment of shares to the first defendant was carried out by the former directors ('the allotment'). The allotment was allegedly pursuant to a settlement agreement dated 25 August 2020 entered into by the plaintiff with China Idea Development Ltd ('CIDL') and the first defendant ('settlement agreement');

(e) the settlement agreement provides amongst others:

(i) an acknowledgment of the loan granted to the plaintiff in 2016 by CIDL and that the plaintiff therefore owes CIDL a sum of RM9,239,399 ('plaintiff's debt');

(ii) the first defendant was to settle the plaintiff's debt to CIDL; and

(iii) in return, the plaintiff will allot the shares to the first defendant.

(f) as a result, the first defendant was, on 26 August 2020, recorded as a shareholder of the plaintiff. Subsequently, on 2 September 2020, the shares were transferred to the second defendant ('the transfer'); and

(g) on 8 September 2020, the pt and the third defendants as shareholders of the plaintiff, issued the notice of EGM to remove the new directors; and

[5] consequently, the present originating summons was filed by the plaintiff seeking the declaratory orders as previously mentioned. The first and the third defendants then filed applications to strike out the originating summons.

PARTIES' CONTENTION

[6] The plaintiff submitted that the allotment is invalidated by parag 3 of the order. Therefore, since the first defendant had no title as a matter of law to the shares, it follows that he could not confer any title to the second defendant and hence, the second defendant was not a shareholder of the plaintiff. Following therefrom, the second and the third defendants had no *locus* to issue the notice of EGM.

[7] In opposing encl 1, the first and the third defendants relied substantially on the submissions filed for encls 24 and 27. In essence, it was submitted that the originating summons ought to be struck out because the plaintiff failed to name the proper contradictors and interested parties ie CIDL and former directors as defendants in this action.

[8] Further, the defendants argued that para 3 of the order did not cover the allotment and the transfer of the shares.

[9] This court will examine the issues put forth by the parties in the analysis below.

ENCLOSURES 24 AND 27 — STRIKING OUT APPLICATIONS BY THE FIRST AND THIRD DEFENDANTS

Analysis

[10] The plaintiff in this originating summons sought to declare that all acts taken by the former directors prior to 6 March 2020 which were not subsequently validated by the new directors would be null and void. The originating summons falls squarely on this issue. It is not an issue that is seeking any remedies against the former directors. None of the prayers are seeking any form of damages or positive act that requires action on the part of the former directors. It is clear to this court that the plaintiff is not assailing the conduct of the former directors.

[11] Counsel for the first defendant argued that an action that is seeking a remedy under s 75 of the Companies Act 1965 must necessarily include the

former directors. With respect, such an argument is flawed for the reason explained by this court, in particular, there is no such prayers that are seeking any form of recourse against the former directors let alone one under s 75 of the Companies Act 1965. The defendants cannot force on the plaintiff how it should shape its claim to only then argue it is flawed.

[12] Similarly, the argument that CIDL must be named in the action is also misplaced. There is nothing that the plaintiff is seeking form CIDL. Again, the defendants cannot force the plaintiff to name CIDL as a defendant when no remedy is being sought against CIDL.

[13] Like the former directors, CIDL too has no legal interest in the shares. At best CIDL may have a commercial interest in the settlement agreement but that is not sufficient to be added as a party to the case as relevant parties are parties with a legal interest and not commercial interest (see *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52).

[14] A long list of cases was provided by the defendants for this court's consideration on the proper contradictor rule. One of which was a decision by Nanthabalan J (now JCA) in *Tan Wei Lian & Ors v Mansor bin Masikon & Ors* [2019] MLJU 1227. This court takes no exception to the decision in *Tan Wei Lan.* There, the conduct of two directors in appointing several other directors to the board during the extraordinary general meeting of the company was called into question. The court rightly ruled that the failure to make the two decision making directors as defendants attracted the proper contradictor rule.

[15] By contrast, the issue before this court is not one which requires an examination of why the former directors entering into the settlement agreement or allotting the shares. There is nothing that requires this court to make such a determination. In short, the plaintiff is not assailing the conduct of the former directors.

[16] What is before this court is purely an interpretation of the order. More specifically, whether on the face of the order, was there a breach of para 3.

[17] On the facts, it is the finding of this court that the proper contradictor argument cannot be supported. Consequently, the argument of a beach of natural justice and abuse of process falls.

[18] This court is persuaded by the argument of counsel for the plaintiff that the proper contradictor argument was put across as a red herring calculated to divert the attention of this court from the real issue namely the right of the plaintiff to seek a declaration premised on the four corners of the order.

[19] This court is of the view that this originating summons which is seeking a declaration dehors of the former directors and CIDL must be tested at the hearing of the originating summons itself. It is a question of whether this court can make a determination of the issues and disputes against the defendants based on the current parties.

[20] The Rules of Court 2012 at O 15 r 6(1) provides as follows:

> 6 Misjoinder and non-joinder of parties (O 15 r 6)
>
> (1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

[21] Therefore, whether or not the plaintiff is entitled to relief in the absence of the former directors and CIDL is a matter by itself that merits consideration t the hearing of the originating summons as O 15 r 6 allows it.

[22] Ultimately, only in plain and obvious cases that recourse should be had to the summary process under O 18 r 19 of the Rules of Court 2012 and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd* [2006] 4 MLJ 271; [2006] 2 CLJ 1021; *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2012] 1 LNS 817; *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520; [2013] 8 CLJ 329; and *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1; 4 MLJ 520).

[23] It is the considered view of this court that this is not a proper case for the court to exercise the drastic powers to strike out a case on the arguments raised. It is trite that such an action must sparingly be carried by any court (see: *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347; [1985] CLJ Rep 45; [1985] 1 CLJ 235).

[24] In the foregoing, the applications by the first and the third defendants to strike out the originating summons are dismissed.

ENCLOSURE 1: THE ORIGINATING SUMMONS

[25] The plaintiff sought to argue that their case rest purely on the plain reading of the order. It was argued by Mr Mohanadass Kanagasabai, counsel for the plaintiff that:

(a) by reason of para 3 of the order, the allotment by the former directors to the first defendant has been annulled, avoided and invalidated;

(b) as a result, the first defendant has no rights or entitlement to the shares under the allotment following such invalidation. The first defendant could not, as a matter of law, then transfer the shares to the second defendant because of the *nemo dat quod non habet* principle;

(c) hence, the second defendant therefore did not acquire any shares in the plaintiff, as a matter of law and the second defendant is not entitled to exercise any rights attached to the shares; and

(d) absent any right to the shares, there was no basis for the second and the third defendants to issue the notice of EGM.

[26] The first and the third defendants were on common ground in challenging the originating summons. Counsel for the third defendant took the lead in the submissions which was fully adopted by counsel for the first defendant. In essence, the challenge was anchored on the interpretation of para 3 of the order.

[27] They argued that the order had two preconditions before validation by the new directors is required, namely: (1) acts of the former directors must be prior to 6 March 2020; and (2) those acts were only taken subsequent to 6 March 2020.

[28] The second defendant mounted the challenge on the originating summons based on a claim that he was a bona fide purchaser for value of the said shares. In response, the plaintiff argued that the second defendant was not a bona fide purchaser and that the second defendant could not have gotten a better title than the first defendant who was said to have derive no good title to the shares. It was in essence an applicability of the *nemo dat quod non habet* maxim.

ANALYSIS

Effect of para 3 of the order

[29] In considering the argument raised by the first and the third defendants, it is apposite for us to revisit the original intent of OS 131 brought by the

A conveners of the adjourned EGM dated 6 March 2020. It is clear to the mind of this court that OS 131 was intended to cement the position of the conveners that the meeting held on 6 March 2020 had validly removed the former directors of the plaintiff and replaced by three new directors members namely Chiew Keong On, Yapp Kiam Yen and Wong Koon Wai, the names of which B were mentioned in paras 3 and 4 of the said order. In essence, after the adjourned EGM on 6 March 2020, there was a new set of directors on the Board of the plaintiff. The former directors no longer had authority to act for the plaintiff.

C

[30] The first and the third defendants contended that para 3 is meant to prohibit *only acts of the former directors prior to 6 March 2020* (the date of their removal) and *taken thereafter* will be caught by para 3 of the order. It follows that the former directors was not bound by para 3 of the order because the acts of the directors in entering into the settlement agreement was on 25 August D 2020 and the allotment was on 26 August 2020. In short, it did not trigger the first precondition that the acts must be acts done prior to 6 March 2020.

[31] While the dates in which the acts were done are important, to the mind of this court, the bigger issue to be considered is the fact that para 3 expressly E states that the acts of the former directors will require *validation* from the new directors. It would be absurd to make an interpretation that the validation by the new directors were not required simply because they were not acts of the directors prior to 6 March 2020.

F

[32] Such an argument if accepted, endorses acts done by the former directors as valid when in actual fact, they had no authority to act for the plaintiff. This simply is contrary to the intention of OS 131 itself which clearly sought to remove the former directors from the Board.

G

[33] It is important to determine the manifest purpose of the order. In interpreting an order, the court's intention must be ascertained primarily from the language of the judgment or order in accordance with the usual well known rules of interpretation of documents. As in the case of document, a judgment H or order and the court's reasoning given must be read as a whole in order to ascertain its intention (see *Finishing Touch 163 (Pty) Ltd BHP Billiton Energy Coal South Africa Ltd and others* [2012] ZASCA 49 (Supreme Court of South Africa); and *Pelangi Prestasi Sdn Bhd v Sabah Forest Industries Sdn Bhd & Ors* [2020] MLJU 690.)

I

[34] The Federal Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 endorsed the principle that interpreting orders of court is similar to interpreting clauses of a deed. Every part of the order must be given effect and if this if possible, the court should not strike out or nullify the paragraph in the

order unless it is impossible to reconcile it with another more express clause in the same order.

[35] Looking at the order in totality, it is clear to this court that the order of OS 131 meant to endorse the removal of the former directors of the plaintiff from the Board and consequentially rendering them to be void of any authority. No other interpretation can be had from a read of the order.

[36] The principles pertaining to interpretation of orders is best summed up by the Federal Court in *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors* [2017] MLJU 1078. Here the apex court held as follows:

> [11] The issue thus turned on the proper construction of the Federal Court order of 26 April 2016. Learned counsel for Ho Hup submitted at length on the applicable principles of construction of judicial pronouncements, on which there was no disagreement between the parties. The applicable principles are summarised as follows:
>
> (a) *A court, in construing any order of another court must, as far as possible, give effect to every part of the order*;
>
> (b) *A part of an order may only be read down if it cannot be reconciled with another, more express, part of the order; and*
>
> (c) *It is only when there is ambiguity in the order that the court may have regard to the grounds of judgment or to the pleadings in the case to aid in the proper construction of the order;*
>
> (d) Those principles can be distilled from the spooch of Chong Siew Fai FCJ in *Newacros Sdn Bhd v Sri Alam Sdn Bhd* [2002] 2 MLJ 353; [2000] 2 AMR 1730; [2000] 2 CLJ 833; [2000] 1 MLRA 184. To these I would add a fourth.
>
> (e) It will not be open to a subordinate court to strike down or to nullify any part of an order granted by a superior court. (Emphasis added.)

[37] The third defendant's interpretation of para 3 of the order can be seen from their submissions which read as follows:

> 27. The express terms of the HC Order clearly showed that there were 2 pre-conditions before nullification or validation by the New Board, namely (1) acts of the previous directors prior to 6.3.2020 and (2) those acts were implemented subsequent to 6.3.2020. This is seen in the express words of the HC Order as follows:
>
> all acts of the directors and/or directors of the defendant as comprised prior to the passing of the resolutions on 6.3.2020,
>
> and taken subsequent to the passing of the resolution on 6.3.2020,
>
> unless validated by Chiew Keong On, Yapp Kiam Yen and Wong Koon Wai, as

validly appointed directors pursuant to the Adjourned Extraordinary General Meeting of Golden Plus Holdings Berhad on 6.3.2020, are null, void and invalid:

28. Premised on the plaintiff's own averments, the Settlement Agreement was dated 25.8.2020, the Allotment was effected on 26.8.2020 and the Transfer occurred on 2.9.2020.

29. These were not acts taken prior to 6.3.2020 and hence, were not caught by minute 3 of the HC Order.

[38] It is the view of this court that the order cannot be read in the manner interpreted by the defendants. To do so would render the order otiose. The order must be read purposively. From a reading of the pleadings in OS 131, it was meant to give effect to the removal of the directors from the Board and their powers must inextricably be lost as a result of the removal. The interpretation that the acts of the directors were not caught by the order because it was an act done after 6 March 2020 cannot hold water.

[39] If the argument by the defendants that the order only catches acts prior to 6 March 2020 and taken (implemented) after 6 March 2020, they must also recognize that after 6 March 2020, they had no authority to act by virtue of their removal. The window between 6 March 2020 (the date of their removal) and the order of the court on 28 August 2020 is not a window that conferred them authority to act for the plaintiff. Such an interpretation flies in the face of reason as it purports to acknowledge the directors having power even after being removed.

[40] This court is persuaded by the argument of Mr Mohanadas, counsel for the plaintiff that the order was a judgment in rem. It therefore binds the world at large. Reference is made to the definition of judgment in rem as illustrated in *Halsbury's* where the relevant excerpt is reproduced below:

(B) Judgments Determining Status

1160. Meaning of 'judgment in rem'. The term 'judgment in rem' has been judicially described as 'a specialised and somewhat misleading term of art limited to judgments concerned with status'. *A judgment in rem may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. Apart from the application of the term to persons, it must affect the subject matter of the proceedings in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer.* (Emphasis added.)

[41] Reference is also made to the decision of the High Court in *Tan Wei Mia & Anor v Tan Kom Kok & Ors* [2010] MLJU 470 where the court discussed the following issues pertaining to what is a judgment in rem:

> The first contention raised by Encik Robert Chung, tne learned Counsel for the plaintiffs concerns that of the nature and effect of the 1941 Judgment. According to the learned Counsel, the 1941 Judgment is a *judgment in rem.*
>
> He quoted paragraph 597 in *Halsbury on Evidence* (Vol 17) which explains that a judgment in rem is 'a judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation), it is conclusive of the facts or state of things actually decided or effected. This principle is often analysed as being example of estoppels by record, which has already been discussed. *The conclusiveness of judgments in rem of the matters actually decided is against all persons, whether parties, privies or strangers to the decision.* (Emphasis added.)

[42] In the case of *Public Information Officer I Joint Secretary to Chief Commissioner of Land Administration. Hyderabad and Another v AP Information Commissioner (Under Right to Information Act 2005) Rep By Its Chief Information Commissioner Hyderabad And Others* 2009 (1) Andhra Law Times Reports 700, it was held that:

> *where a document recognizes successors in title and such decision is based on enquiry essentially there is determination of rights. It is certainly not an order or judgment in personam*. It is not only between rivals staking claim to property mentined in Muntakhab by declaration contained there in operates against entire world. In that sense, it is a judgment in rem. (Emphasis added.)

[43] It is the view of this court that the order was a notice to the world at large that acts of the former directors prior to 6 March 2020 and taken after 6 March 2020 must constitute a judgment in rem. It is not a judgment that determines the rights of two parties inter se. Instead, it is a pronouncement that all acts falling within the stipulated time frame would require validation by the new directors. It is therefore, not a judgment in personam.

[44] It is clear to the mind of this court that the allotment was invalidated by para 3 of the order. The allotment was null and void because it was an act of the former directors carried out on 26 August 2020. Paragraph 3 was therefore the annulment order. The effect of an annulment order is to negative any right or the tittle that may have existed even if registration has taken place. This is consistent with the Court of Appeal decision in *Pentadbir Tanah Klang, Selangor Darul Ehsan v Mohd Ghazali bin Ahmad* [2017] MLJU 154 held that despite registration, the party claiming he has 'no title over' the subject matter as a result of an annulment order to annul the document of title.

[45] As no validation was obtained from the new directors, the allotment and the subsequent transfer of the shares was in breach of para 3 of the order.

The transfer of shares to the second defendant

[46] The consequence of this court's finding that the allotment was null and void means that the first defendant has no title as a matter of law to the shares. Therefore, he could not confer any title to the second defendant.

[47] This is a consequence of the *nemo dat quod non habet* rule which finds statutory formulation in s 27 of the Sale of Goods Act 1957. That section applies to shares and reads as follows:

> 27 Sale by person not the owner
>
> (1) Subject to this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to ...

[48] By reason of that rule, the second defendant could not have held any title on the shares greater than the first defendant who, in any event, held nothing. In the Court of Appeal case of *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413, the court held as follows:

> [42] Based on the authorities we have thus for discussed and applying the principles they have laid down to the facts and Circumstances of the present instance, we are of the view that it was not the objective intention of the parties to the loan documents that the first defendant should be entitled to sell off the LPF shares to the second and third defendants or indeed to anyone else, before 8 January 2005. *It follows that the first defendant having had no authority to sell the shares could pass no title to the second and third defendants. Nemo dat quod non habet. The sale by a non-owner of goods to a third party is void.* See *Hollins Fowler* [1875] Law Rep 7 HL 757. This principle is now codified in 27 of our Sale of Goods Act 1957. None of the exceptions to s 27 apply, of course, in this case. And for completeness , we would refer to s 2 of the Act of 1957 which defines 'goods' as including stocks and shares. In this respect, our statute differs from the English equivalent.
>
> [43] *Since the first defendant had no title to pass to the second defendant, the latter acquired no title to the LPF shares*. We must therefore respectfully but with regret differ with the learned judge 's finding for the defendants. We think he was wrong and should have found for the plaintiff. For the reasons already given, these appeals must be allowed. (Emphasis added.)

See also *Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, intervener)* [1996] 2 MLJ 369; *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188 and *Kenneth Teh Ah Kiam & Anor (receivers and managers of Global Pacific Textile Industries Sdn Bhd, in*

receivership) v Ketua Pengarah Jabatan Kastam & Eksais & Ors [1998] 1 MLJ 289

[49] The first defendant however, chose not to file an affidavit to rebut the contention of the plaintiff. The consequence of such a failure is that he is deemed to have accepted the facts as stated by the plaintiff. Accordingly, the allotment of the shares to the second defendant was null and void.

The status of the second defendant as purchaser

[50] The second defendant argued that that he was a bona fide purchaser of the shares. This was refuted by the plaintiff who argued otherwise.

[51] This court examined the chronology of events that led to the allotment of the shares to the first defendant and the subsequent transfer to the second defendant.

[52] What has been seen from the facts is that the second defendant never paid for the said shares he purportedly purchased from the first defendant. This can be seen from the contents of his affidavit.

[53] At paras 32 and 33, the second defendant averred as follows:

> As part of the agreement:
>
> I had to pay Eng RM100,000 .00 for the 46, 196, 995 shares. In return, he will transfer to me the 46, 196,995 shares.
>
> I had to take over Eng's obligation to pay the debt owed to CIDL of RM9, 239,399.00. If I do not do so, CIDL will take back the 46,196, 995 shares in Golden Plus that I hold.
>
> I asked CIDL for time to pay it the RM9, 239, 399.00. *I said that I will only pay it if Peng and I get control of Golden Plus*. I wanted Peng to be in control of Golden Plus together with me, because, he is a long-time shareholder of Golden Plus and is more familiar with Golden Plus than I am.

[54] It is an undisputed fact that the second and third defendants did not get to control the plaintiff.

[55] The burden of proving that he falls within this exception of a bona fide purchaser is on the second defendant. It is trite that the exception may only be invoked if the purchaser has provided valuable consideration. From the second defendant's own admission in his affidavit, it is clear that he has merely promised to pay but has to date, not paid. The need to demonstrate that valuable consideration had been passed by a bona fide purchaser can be seen in

A the case of *Malayan Banking Bhd v Premier Expand Sdn Bhd & Ors (the owners of and/or any other persons interested in the ship or vessels the 'Zuhairi' and 'Nasuha')* [2013] 8 MLJ 32.

B **[56]** The non-payment precludes a person from qualifying as a bona fide purchaser for valuable consideration. In the Court of Appeal case of *Kwan Ngen Wah & Ors v Hiew Kon Fah & Ors and other appeals* [2019] MLJU 226; [2019] 6 CLJ 722 at para 64:

> [64] Given the facts and circumstances of the case and the direct testimony of
C Hamid Dullih, we conclude that no consideration had passed from Hamid Oullih to the natives, neither was there any from Julita to Hamid Dullih or from Hiew to Julita. We agree with Kwan Brothers that the transfer of valuable lands to the buyer without payment of the purchase price at the insistence of the purported seller cannot be anything, but a sham. *And absent any consideration we find that Hiew had*
D *not proved his case that he was a bona fide purchaser of the lands for value. It follows that Hiew and Gabungan had no rights over the lands and were not entitled to seek possession of the lands*. The learned judge was therefore correct to dismiss both Hiew and Gabungan's claim against Kwan Brothers and Kwantas. (Emphasis added.)

E **[57]** A promise to pay which remains unfulfilled is executory and not executed. It is not valuable consideration for the purpose of the bona fide principle. In this context, the case of *Great Investments Ltd v Warner* (2016) 335 ALR 542 (Tab 10) at para 109 is instructive where the court held:

F > [109] The liquidators also submitted that the appellants were not bona fide purchasers for value because, apart from Mr Xu (whose evidence was that he accepted the bonds in part payment of the debt owed to him), the evidence of Dr Kwok and Mr Hong (for Great Investments) was that the receipt of the bounds would only discharge the debt to the extent that money was realised from the bonds or to the exter d to which they retained their value. In relation at least Dr Kwok and
G Mr Hong, the defence of bona fide purchase would fail for this reason also. *There is considerable older precedent which establishes that 'value' is not provided for the purposes of the doctrine where a promise is executory, not executed: Tourville v Naish* (1734) 3 P W ms 307; 24 ER 1077; *Story v Lord Windsor* (1743) 2 Atk 630; 26 ER 776. There may be doubt about the extent of this exclusions: see Farah at [188] (the
H Court). However, any doubts have not been extended to suggesting that an unfulfilled, conditional forgiveness of debt could be sufficient value. (Emphasis added.)

I **[58]** The Court of Appeal also held in *International Bank Malaysia Bhd (formerly known as Hock Hua Bank (Sabah) Bhd) v Lovintih bte Balantai @ Betty* [2007] 7 MLJ 97; [2007] 6 CLJ 279 that taking ownership in exchange for future consideration is no consideration and such transaction is bad in law and equity. The court held as follows:

> Thirdly, the first defendant took the transfer of ownership in the land to himself

without providing any consideration whatsoever to the plaintiff. *The intended future consideration is no consideration. This kind of transaction is bad in law as well as in equity.* (Emphasis added.)

[59] Given the finding of this court that the second defendant did not pay for the shares, his claim to be a bona fide purchaser for value is without foundation in law and is rejected. At best, he has merely promised to pay. It is trite that consideration which is executory is insufficient to invoke the doctrine.

[60] This court can safely infer that the second defendant is not a bona fide purchaser and the settlement agreement was simply a device to transfer the shares to him. This is because of the second defendant's ability to unilaterally postpone his payment obligations with no contractual consequence, impose conditions on his payment which do not find expression in the contract, and receive transfer of the shares in direct breach of the agreement.

[61] A genuine or bona fide sale and purchase transaction or an arms length transaction cannot conceivably be one where the second defendant is able to postpone payment obligations, at his own terms, but still able to acquire valuable shares .

[62] It is also pertinent for this court to consider the argument by the plaintiff that there was an 'unholy haste' in the conduct of parties with regards to the allotment to the first defendant and the subsequent transfer of the shares to the second defendant.

[63] Given that the admission of non-payment was made by the second defendant himself, there is nothing to refute the fact that the transfer of shares from the first defendant to the second defendant was without consideration and in the colloquial terms 'free of charge'. It boggles the mind of this court that such an arrangement can be put into place when at stake was a block of shares of a company which is the subject matter of bitter disputes in several suits.

[64] This court also examined the timeline of significant events. The allotment was carried out on Wednesday, 26 August 2020, two days before this court handed down the decision in OS 131 on Friday, 28 August 2020. The weekend was however a long one as the Merdeka Day public holiday fell on the following Monday, 31 August 2020. On the same day this court handed down its decision, solicitors for the successful conveners in OS 131 gave notice to the Company Secretary of the decision of this court via a letter dated 28 August 2020.

[65] On Wednesday 2 September 2020, the shares were transferred to the second defendant. The order of the court was then extracted and served on the company secretary on 4 September 2020. On 8 September 2020, the second and the third defendants then issued the notice of EGM to remove the new directors.

[66] The allotment and transfer of the shares were carried out at lightning speed which sidestepped several key contractual terms. It follows that the 'unholy haste' description was not without basis. The transaction between the first and the second defendants were not in any manner conducted at arm's length. It was a well-coordinated arrangement between them and other interested parties in the settlement agreement.

[67] What is also interesting to note is the fact that the first defendant himself, did not make any payment to CIDL as the payment was supposed to be made by the second defendant. However, the first defendant stood to gain RM100,000 for the cameo role he played. Strangely, the first defendant did not file any affidavits to explain the reason why such arrangements were made.

[68] Based on the above observations, this court finds as a fact that the second defendant was not a bona fide purchaser of the shares. He was part of the scheme that was put in place to ensure that the allotted shares were transferred to a third party with the intent of diluting the shares of the plaintiff. The second defendant cannot come before this court to say he was a bona fide purchaser of the said shares.

[69] The transfer of the shares to the second defendant was therefore null and void.

CONCLUSION

[70] In the foregoing, this court rules as follows:

(a) the striking out applications in encls 24 and 27 are dismissed with costs; and

(b) encl 1 is allowed and all the prayers therein are granted but for prayers 4 and 8.

Plaintiff's OS allowed and defendant's striking out application dismissed.

Reported by Ashok Kumar